Are Same-Sex Marriages Really a Threat to Religious Liberty?

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INTRODUCTION

Social conservatives have made religious liberty a rallying cry in their opposition to according same-sex couples the same right to marry enjoyed by mixed-sex couples, going so far as to assert that if gay or lesbian couples can legally marry, clergy who decline to officiate may be charged with hate crimes,

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and their churches and synagogues may lose tax-exempt status.\textsuperscript{1} Massive publicity campaigns to promote such fears have influenced public opinion, likely affecting election outcomes in California and Maine, where ballot initiatives have deprived same-sex couples of the right to legally marry.\textsuperscript{2}

This Article endeavors to show that the fears expressed for religious liberty are poorly grounded, having no basis in law or experience. Churches and their clergy face no risk of civil or criminal liability for adhering to liturgical limitations on religious marriages—even if they refuse to host or officiate at the weddings of people who have a legal right to marry. Nor does a church, synagogue, or mosque risk losing its tax-exempt status for denying religious rites to people who may legally marry.

Many religious traditions have long denied liturgical marriage rites to people who have an unquestionable legal right to marry, and have done so without subjecting their clergy to legal liability or their houses of worship to loss of tax-exempt status. The marriages of same-sex couples should pose no greater threat to the religious liberty of socially conservative churches and clergy than do the lawful marriages of so many others that contravene the rules limiting various faith traditions’ liturgical marriages.\textsuperscript{3}

Legally recognizing marriages of same-sex couples poses no greater danger to the religious liberty of Catholics, for example, than does legal recognition accorded to marriages of Americans who have obtained civil divorces and remarried in contravention of Catholic doctrine. According same-sex couples the same right to marry that mixed-sex couples enjoy threatens the religious liberty of those who cannot sanction such unions in their own churches and synagogues no more than lawful interfaith marriages can threaten the religious liberty of synagogues and rabbis, or of mosques and imams, that interpret their scripture and tradition to prohibit such unions.\textsuperscript{4}

Two cases that opponents of marriage equality often cite to suggest that same-sex couples’ right to marry might endanger churches’ tax-exempt status, \textit{Bob Jones University v. United States} and \textit{Ocean Grove Camp Meeting Ass’n v. Vespa-Papaleo}, do not even concern the tax-exempt status accorded to churches as religious organizations.\textsuperscript{5} In one, the Supreme Court sustained an IRS policy denying educational tax exemptions to schools that discriminate on the basis of race. But the Court emphasized that its holding did not apply to churches. In the other, New Jersey officials challenged a beach community’s real-estate tax exemption granted on the basis that public facilities would be held open for all to use, because the community then discriminated against longtime lesbian residents who reserved the facilities for a civil-commitment
ceremony. No church's tax exemption was involved, challenged, or lost. Neither case suggests a church might lose its tax-exempt status for denying marriage rites to same-sex couples, or for speaking against same-sex relationships.

The real threat to religious-liberty interests does not arise from the ability of some to marry in contravention of certain faith traditions' liturgical limitations; rather, it comes from efforts to impose those traditions' liturgical rules by imposing them on others who do not share them and do not wish to be bound by them. Religious freedom for all is fully realized only when each faith tradition may follow its own rules without binding others to follow them. 6

I. SOCIAL CONSERVATIVES CLAIM THAT PERMITTING SAME-SEX COUPLES TO MARRY THREATENS RELIGIOUS-LIBERTY INTERESTS OF CHURCHES AND CLERGY

Some believe that recognizing the right of same-sex couples to marry presents a grave threat to the religious-liberty interests of socially conservative religious movements whose liturgies cannot accommodate same-sex marriage as a religious rite. 7 It appears, moreover, that considerable effort has been devoted to creating this perception, and to instilling fear that clergy might face civil and even criminal liability for declining to solemnize marriages of same-sex couples.

Elements of the religious right have taken the lead in spreading such fears. In 2003, the Southern Baptist Convention published The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today, in which the Alliance Defense Fund's Alan Sears and Craig Osten warn that “the religious freedoms of all Americans are under attack from radical homosexual activists.” 8 Sears and Osten charge that, if gay and lesbian couples may legally

marr{e}, churches whose clergy will not solemnize the marriages will lose their
tax-exempt status and face civil suits for discrimination.\textsuperscript{9} Sears and Osten
conclude with a call to action: “We have a choice. We can either stand up and
fight for our religious freedoms or allow the radical homosexual activists to
cow and silence us.”\textsuperscript{10}

In their 2005 book, \textit{The ACLU vs. America}, also published by the Southern
Baptist Convention, Sears and Osten reiterate that “legal scholars and church
leaders believe the ACLU and its allies will use the same-sex ‘marriage’ issue
as a form of legal extortion to force them to perform same-sex ‘marriage’
ceremonies or have their tax-exempt, nonprofit status revoked on
discrimination grounds.”\textsuperscript{11}

In another book marketed to evangelicals, Coral Ridge Ministries
teleevangelist Rev. D. James Kennedy bluntly warns: “Same-sex marriage will
criminalize Christianity.”\textsuperscript{12} “One goal of the homosexual activists is to silence
the churches,” the Alliance Defense Fund co-founder declares, asserting that if
same-sex couples can lawfully marry, then “[h]ate crime laws and
antidiscrimination laws will mean the criminalization of anyone who dares to

\begin{footnotes}
\footnote{SEARS & OSTEN, \textit{supra} note 8, at 161 (asserting that loss of tax-exempt status “is
something that many are warning will happen when evangelical churches refuse to perform
same-sex ‘marriages,’” and suggesting that the Catholic Church will face discrimination
suits); \textit{id.} at 215 (“churches that do not perform same-sex ‘marriages’ could also face legal
challenges to their tax-exempt status . . . .”) (citing Robert B. Bluey, \textit{Marriage Changes May
Shake Churches’ Tax Exemption}, CNSNEWS.COM (Feb. 23, 2004)). A revised version of
Bluey’s article dated July 7, 2008, is available at http://www.cnsnews.com/news/article/marriage-changes-may-shake-churches-tax-
exemptions.}
\footnote{SEARS & OSTEN, \textit{supra} note 8, at 202.}
\footnote{ALAN SEARS & CRAIG OSTEN, \textit{THE ACLU VS. AMERICA: EXPOSING THE AGENDA TO
REDEFINE MORAL VALUES} 48 (2005).}
\footnote{D. JAMES KENNEDY & JERRY NEWCOMB, \textit{WHAT’S WRONG WITH SAME-SEX
Ministries, a radio and television outreach that since 1974 has been bringing the gospel to
America and the world,” and that his co-author Jerry Newcombe “is Senior Producer of ‘the
Coral Ridge Hour.’” \textit{id.} (back cover). Sears and Osten formally dedicated \textit{The Homosexual
Agenda} “to the founding members of the Alliance Defense Fund including: the late Bill
Bright, the late Larry Burkett, James C. Dobson, D. James Kennedy, Marlin Maddoux, and
America}, is similarly dedicated to “the founding members of the Alliance Defense Fund,
including the late Dr. Bill Bright, the late Larry Burkett, the late Marlin Maddox, the late
William Pew, Dr. James C. Dobson, and Dr. D. James Kennedy.” SEARS & OSTEN, \textit{supra}
note 11, at vii.}
\end{footnotes}
disagree with their perversions."\textsuperscript{13} A 2008 book published and promoted by the far-right WorldNetDaily adds: "Once federal and state laws uphold gay marriage, gays will be entitled to sue anyone licensed by the state that refuses to perform a marriage."\textsuperscript{14}

In a book first published in 2004, evangelical pastor Erwin W. Lutzer writes that an attorney advised him that "when same-sex marriage becomes a reality, churches that refuse to perform such unions will find their tax-exempt status will soon be revoked," and that many churches will be bankrupted by "endless lawsuits."\textsuperscript{15} A revised and expanded 2010 edition of Rev. Lutzer's \textit{The Truth About Same-Sex Marriage} reiterates that "the gay agenda" seeks to "punish churches...that discriminate against their lifestyle choices."\textsuperscript{16} Rev. Lutzer writes that "Douglas Kmiec, current law professor at Pepperdine University and previous head of the Office of Legal Counsel for Presidents Ronald Reagan and George H.W. Bush," has warned that, when same-sex couples can legally marry, "churches may well lose their tax-exempt status (which would mean financial calamity for most) if they refuse to perform same-sex marriage ceremonies."\textsuperscript{17} Professor Kmiec has, indeed, written that this threat is real, asserting that "one of the main aspirations of the homosexual movement is retaliation against the defenders of traditional marriage."\textsuperscript{18} Inciting his readers to anti-gay action, Rev. Lutzer asks, "what will you do when people in America start being imprisoned for stating their beliefs about homosexuality?"\textsuperscript{19}

The Becket Fund for Religious Liberty has done much to feed this hysteria. Writing in the \textit{Washington Examiner} as "a lawyer with the Becket Fund," Roger Severino asserts that even if "the First Amendment protects dissenting houses of worship from being forced to perform same-sex wedding ceremonies against their will," they may still "have their tax exemptions denied and even lose the ability to solemnize civil marriages."\textsuperscript{20} Writing in the Federalist Society's flagship publication, the \textit{Harvard Journal of Law and Public Policy},

\textsuperscript{13} Kennedy & Newcomb, \textit{supra} note 12, at 67.
\textsuperscript{15} Erwin W. Lutzer, \textit{The Truth About Same-Sex Marriage: 6 Things You Need to Know About What's Really at Stake} 31 (1st ed. 2004).
\textsuperscript{17} Id. (citing Douglas W. Kmiec, \textit{Same-Sex Marriage and the Coming Campaigns Against Religious Freedom}, in \textit{SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS} 103, 105 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. 2008)).
\textsuperscript{18} Kmiec, \textit{supra} note 17, at 104.
\textsuperscript{19} Lutzer, \textit{supra} note 16, at 112.
Severino declares, "the movement for gay marriage is on a collision course with religious liberty," bound to produce "pervasive church-state conflict and substantial chilling of religious expression." 21

In the Federalist Society’s organ, Severino predicts that if gays and lesbians can legally marry, religious institutions may face "civil liability," 22 and "houses of worship" will be subject to actions to "have their state and federal tax exemptions revoked." 23 Severino adds that state hate-crime laws would provide "potential avenues of civil or criminal liability for religious institutions that preach against homosexual marriage," 24 and that criminal convictions are possible "given the increasing reliance of American courts on foreign precedents." 25 But close inspection reveals that Severino’s examples of foreign “hate-crime” prosecutions do not generally involve speech against same-sex marriage. 26 The singular instance of a Swedish pastor prosecuted for speaking against gays and their relationships was overturned on appeal for violating liberty interests protected by the European Convention on Human Rights. 27 And, of course, the United States Constitution provides greater protections for

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22. Severino, supra note 21, at 945.

23. Id. at 974. Severino cites University of Chicago Professor Richard A. Epstein who says, "[p]rivate churches losing their tax exemptions for their opposition to homosexual marriages . . . are among the very dangers from the left against which I have warned." Id. at 974 (quoting Richard A. Epstein, Letter to the Editor, Same-Sex Union Dispute: Right Now Mirrors Left, WALL ST. J., July 28, 2004, at A13).

24. Id. at 970.

25. Id. at 971.


free speech and religion than do European precedents.  

On the domestic front, Severino nevertheless insists that “suits over religious speech are no longer strictly conjectural in the United States.” He points to Bryce v. Episcopal Church in the Diocese of Colorado, where, as Severino tells it, a lesbian “youth minister sued her church for sexual harassment for stating that homosexuality is a sin, idolatrous, and incompatible with Scripture.” Severino emphasizes that “the church statements were made in the context of a parish meeting called in response to discovery of the youth minister’s recent civil commitment ceremony with her homosexual partner.” He omits mention that the district court tossed out the claim on a motion for summary judgment, and that the Tenth Circuit affirmed, holding that constitutional principles of church autonomy protected the church from any

28. Snyder v. Phelps, 131 S.Ct. 1207 (2011). Many have noted the divergence between the European and American approaches when it comes to speech denying the Holocaust, to distribution or sale of Nazi literature and memorabilia, and with respect to other “hate speech,” all of which European nations may outlaw, but all of which in the United States are activities held protected by the First Amendment. See, e.g., Sionaioh Douglas-Scott, The Hatefulness of Protected Speech: A Comparison of the American and European Approaches, 7 WM. & MARY BILL RTS. J. 305 (1999) (European scholar arguing against the American approach to hate speech); Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, 24 CARDozo L. REV. 1523 (2003) (criticizing the American approach); Thomas J. Webb, Note, Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System, 50 WASHBURN L.J. 445 (2011) (arguing against the American approach); see also, e.g., RONALD J. KROTOZYNSKI JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 126-30 (2009); ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 157-61 (2007); Guy E. Carmi, Dignity versus Liberty: The Two Western Cultures of Free Speech, 26 B. U. INT’L L.J. 277 (2008). In the United States, the First Amendment protects, for example, the right of robed Klansmen to burn crosses or to demand the forcible exile of all African Americans and Jews. Virginia v. Black, 538 U.S. 343 (2003) (invalidating Virginia statute outlawing cross burning); R.A.V. v. St. Paul, 505 U.S. 377 (1992) (voiding conviction for burning a cross and invalidating the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, which had prohibited the display of a symbol that the defendant knew or had reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender); Brandenburg v. Ohio, 395 U.S. 444, 446-47 (1969) (holding that the First Amendment protected a Klansman’s public speech employing offensive racial epithets and declaring that blacks and Jews should be deported). The First Amendment has even been held to protect the right of Nazis to march with swastikas through a Jewish neighborhood inhabited by Holocaust survivors. See National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Collin v. Smith, 447 F. Supp. 676 (E.D. Ill. 1978), aff’d, 578 F. 2d 1197 (7th Cir. 1978). That it similarly protects hateful diatribes against gays and lesbians should come as no surprise.

29. Severino, supra note 21, at 971.
30. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002).
31. Severino, supra note 21, at 971.

Id.
possibility of liability.\footnote{33}

The Becket Fund advances essentially the same arguments in its amicus curiae briefs opposing full civic equality for gay and lesbian citizens, citing the Swedish case to suggest that, if gays and lesbians obtain the right to marry, American pastors who oppose same-sex marriages might be sent to prison.\footnote{34} To demonstrate the danger of civil liability, The Becket Fund’s briefs, like Severino’s article, cite the \textit{Bryce} case to show that churches are being sued. The briefs, however, neglect to acknowledge that \textit{Bryce} held churches to be \textit{constitutionally shielded from civil liability} for speaking against same-sex relationships and discriminating against a lesbian couple.\footnote{35}

Severino and The Becket Fund thus cite precedents—both the Swedish case and \textit{Bryce}—to demonstrate essentially the opposite of what the cases actually hold.\footnote{36} Yet Brigham Young University Professor Lynn D. Wardle writes that “Roger Severino has shown how religious institutions in the United States that refuse to recognize same-sex marriage face significant potential civil liability,” and how their clergy face “potential civil and criminal liability for violating ‘hate crimes’ and ‘hate speech’ laws.”\footnote{37}

\footnote{33. \textit{Bryce}, 289 F.3d at 655-59. “This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity.” Id. at 655. It may be noted that the Supreme Court’s recently issued unanimous opinion, \textit{Hosanna-Tabor Evangelical Church and School v. EEOC}, 132 S. Ct. 694 (2012), holds that the First Amendment’s religion clauses bar employment-discrimination suits when the employer is a religious group and the employee is one of the group’s ministers, citing with approval the Tenth Circuit’s decision in \textit{Bryce}. See \textit{Hosanna-Tabor Evangelical Church}, 132 S. Ct. at 705 n.2 & 709 n.4 (2012).


\footnote{35. See, \textit{e.g.}, Id. at 9; Brief Amicus Curiae of The Becket Fund for Religious Liberty at 16-17 \& n.31, In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999); Brief Amicus Curiae of The Becket Fund for Religious Liberty at 9 \& n.25, Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007) (No. 06-2583), 2007 WL 6149068; Brief Amicus Curiae of The Becket Fund for Religious Liberty at 17 \& n.25, O’Darling v. O’Darling, 188 P.3d 137 (Okla. 2008); cf. Severino, \textit{supra} note 21, at 971 (citing \textit{Bryce}, 289 F.3d 648).

\footnote{36. The United States Supreme Court recently held that Rev. Fred Phelps and his Westboro Baptist Church \textit{cannot} be liable for picketing military funerals with their “God Hates Fags” message. Snyder v. Phelps, 131 S.Ct. 1207 (2011). Under The Becket Fund’s approach to precedent, the case shows that pastors and churches \textit{can} be sued for speaking against homosexuals.

\footnote{37. Lynn D. Wardle, \textit{Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions}, 12 J.L. \& FAM. STUD. 315, 334 (2010). Wardle reprints “a lightly updated version” of Severino’s article in his own collection. Roger Severino, \textit{Or for Poorer? How Same-Sex Marriage Threatens Liberty in WHAT'S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 325, 343 n. † (Lynn D. Wardle ed. 2008) (“lightly updated”). The “lightly updated” reprint continues to cite \textit{Bryce} as demonstrating that “suits over quintessentially religious speech opposing same-sex marriage are no longer conjectural in America,” without acknowledging the case’s actual holding, that the religious speech in question was constitutionally protected. See id. at 337, 352 n.123.}
Many others have worked to popularize the threat of civil and criminal liability imagined to be posed by same-sex marriages. In November 2009, the Manhattan Declaration was published by Watergate felon and evangelical leader Chuck Colson, along with Princeton University's McCormick Professor of Jurisprudence, Robert George, and Samford University Beeson Divinity School Professor Timothy George. The Manhattan Declaration warns that, where same-sex couples may legally marry, "the religious liberty of those for whom this is a matter of conscience is jeopardized,” since “hate-crime laws in America raise the specter” of clergy prosecuted as criminals should they decline to bless a same-sex union. In his BreakPoint radio broadcast, Colson called his manifesto “one of the most important documents produced by the American church,” providing a warning to “civil authorities that we will not, under any circumstances, stand idly by as our religious freedom comes under assault.” He went on to claim that, already, “Christian organizations are losing tax-exempt status for refusing to buy in to homosexual ‘marriage.’” More than half a million people have reportedly signed on as supporters of the Manhattan Declaration.

Such arguments have had a real impact on public opinion, and may well have affected the law in at least two states, California and Maine, where ballot initiatives overturned marriage rights that had been recognized by the State Supreme Court in California, and by the state legislature in Maine. Writing for the Federalist Society's Harvard Journal of Law and Public Policy, the director of the National Organization for Marriage bragged that the campaign for Proposition 8, which overturned same-sex couples' right to marry in California, successfully "highlighted" purported "conflict between laws giving legal status to same-sex couples and the rights of third parties, especially religious believers and organizations." The Yes on 8 campaign advanced the initiative both by promoting concern

39. Id..
41. Id.
42. See MANHATTAN INSTITUTE, http://www.manhattandeclaration.org/home.aspx (last visited Feb. 12, 2012) (reporting that the Manhattan Declaration has collected “516,082 signatures in support”).
43. See In re Marriage Cases, 183 P.3d 384 (Cal. 2008).
that if same-sex couples retained a right to marry, children would be taught about same-sex marriage in elementary school, and by engendering fear that clergy and churches would face legal liability and loss of tax exemptions. 46 The campaign’s key strategists, Frank Schubert and Jeff Flint of Schubert Flint Public Affairs, have said they endeavored to focus public attention on the “conflict of rights” that same-sex marriages would produce, specifically “in the area of religious freedom, in the area of individual freedom of expression, and on how this new ‘fundamental right’ would be inculcated in young children through the public schools.”

Pepperdine University School of Law Professor Richard M. Peterson warned of same-sex marriages’ threat to religious liberty in slick television advertisements that Schubert Flint developed for broadcast throughout the state of California. In one ad, Professor Peterson said that same-sex couples’ ability to marry “changes a lot of things: People sued over personal beliefs. Churches could lose their tax exemptions.” 48 Berkeley Professor Melissa Murray notes: “By all accounts [the ad] was crucial in swaying voters and turning the tide of

46. See Alan Brownstein, Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry, 45 U.S.F. L. REV. 389, 394-95 & n.12 (2010); Melissa Murray, Marriage Rights and Parental Rights: Parents, the State, and Proposition 8, 5 STAN. J.C.R. & C.L. 357, 371 (2009); see also Laurie Goodstein, A Line in the Sand for Same-Sex Marriage Foes, N.Y. TIMES, Oct. 26, 2008, at A12 (“In television advertisements, rallies, highway billboards, sermons and phone banks, supporters of Proposition 8 are warning that if it does not pass, churches that refuse to marry same-sex couples will be sued and lose their tax-exempt status.”); Hendrik Hertzberg, Eight is Enough, NEW YORKER, Dec. 1, 2008, at 27, available at http://www.newyorker.com/talk/comment/2008/12/01/081201taco_talk_hertzberg (observing that the Yes on 8 ads “implied that gay marriage would threaten churches’ tax exemptions”).


48. See Plaintiffs’ Exhibit No. PX0029, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Plaintiffs’ Exhibit No. PX0029, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-02292-VRW) available at https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html; id. (from the court on YouTube) available at http://www.youtube.com/watch?v=yE-bjw4VK_w&feature=player_embedded; id. (from “Yes on 8” on YouTube) available at http://www.youtube.com/user/VoteYesonProp8#p/u/12/4Kn5LNhNto. Professor Melissa Murray provides a detailed description and analysis of the ad in Marriage Rights and Parental Rights, supra note 46, at 369-72. As the ad’s creators describe it, they “segued into political consequences [of permitting same-sex marriages] by featuring a prominent law school professor warning about implications for religious freedom and freedom of expression, and letting voters know that . . . gay marriage would be taught in the public schools.” Schubert & Flint, supra note 47. See also Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. REV. 1235, 1323 (2010) (noting the ad’s themes “that marriage equality would undermine the free exercise of religion (‘churches could lose their tax exemption’) and affect public school programming (‘gay marriage taught in public schools’”).
the campaign.\footnote{49}

Promoting similar fears as the television-and-radio media blitz, the American Family Association produced a video for distribution to evangelical pastors and activists, in which Chuck Colson declared: "This vote on whether we stop the gay marriage juggernaut in California is the Armageddon. We lose this—we’re going to lose in a lot of other ways, including freedom of religion."\footnote{50} The Yes on 8 campaign’s ProtectMarriage.com website carried a \textit{Joint Statement to California’s Religious Leaders Regarding Proposition 8}, warning that, if same-sex couples continued to marry in California, the state’s churches would see non-profit status challenged "for refusing to perform same-sex ‘marriages,’” and both churches and clergy would face “Legal Persecution”:

Religious leaders and churches which open their facilities to the public for marriage ceremonies will be sued for refusing to rent their organization’s facilities to same sex couples for “marriage” ceremonies. Religious leaders may be sued for personally refusing to perform same-sex “marriages.” Pastors may face fines or imprisonment for violation of “hate-speech” laws for basing their messages on the Bible.\footnote{51}

The \textit{Joint Statement} was signed by representatives of the Alliance Defense Fund, among others.\footnote{52}

Although polls in 2008 had shown Proposition 8 to be an unpopular measure, the proposition was pushed to victory by the concerted campaign to instill alarm that churches were threatened, and that religious liberty was at stake.\footnote{53}

\footnote{49. Murray, \textit{supra} note 46, at 372 & nn. 80-81. Its creators indeed have bragged that this ad immediately solidified (and excited) our base and captured the attention of voters across the state. We invested heavily in airing this television ad and a companion-radio spot. We had a lot of ground to make up (our internal polls had us behind by 6 points), but more importantly, it was critical for us to define Prop 8 on our terms. In a little over a week of advertising, we went from being significantly behind, to taking the lead in two published polls. Schubert & Flint, \textit{supra} note 47; see Murray, \textit{supra} note 46, at 372.}


\footnote{52. Id. Signing the statement were: Gary S. McCaleb, Esq., Senior Counsel, Alliance Defense Fund; Robert H. Tyler, Esq., General Counsel, Advocates for Faith and Freedom; Brad W. Dacus, Esq., President, Pacific Justice Institute; and Dean R. Broyles, Esq., President, The Western Center for Law & Policy.}

\footnote{53. See Cummings & Nelajime, \textit{supra} note 48, at 1323 ("Whereas polling put support for Proposition 8 at between 38 and 44 percent when the Yes on 8 ads began to air, by the time of the election on November 5, 2008, Proposition 8 passed with 52% of the vote."); see also Mark DiCamillo, \textit{Why Prop 8 Confounded Pre-Election Pollsters}, S.F. CHRON., Nov.
Opponents of marriage equality reprised the strategy in Maine, where an initiative measure called “Question 1” was placed on the November 2009 ballot to overturn May 2009 legislation permitting same-sex couples to marry. Schubert Flint was called in to blanket Maine with ads like those it had employed to remarkable effect in California. In the Maine campaign’s leading “Yes on 1” ad, Boston College Law School Professor Scott FitzGibbon took on the same role as Professor Peterson in California, warning that permitting gay or lesbian couples to marry could produce lawsuits against those who oppose such unions, and churches’ loss of tax-exempt status. Maine voters were told: “Unless ‘Question 1’ passes, there will be real consequences for Mainers. Legal experts predict a flood of lawsuits against individuals, small businesses and religious groups. Church organizations could lose their tax exemption.”

The “Yes on 1” campaign’s website reiterated that “legal scholars” had opined that permitting same-sex couples to marry in Maine could result in “churches losing their tax exemptions.” And “Yes on 1” e-mail blasts to likely supporters demanded cash for the campaign’s final push saying:

We simply can’t continue to air our powerful ads that make it crystal clear that homosexual marriage WILL be taught in public schools as it is in other states.

10, 2008, at B5 (“Double-digit leads held by the ‘no’ side in the pre-television advertising stages declined precipitously as the TV ad campaigns hit in mid-to-late September.”), noted in Clifford J. Roskey, Perry v Schwarzenegger and the Future of Same-Sex Marriage Law, 53 ARIZ. L. REV. 913, 949 n.274 (2011).

54. Lanz Christian Bafies, Battle Line is Drawn in Maine, VALLEJO TIMES HERALD, Oct. 11, 2009 (reporting that the Yes on 1 campaign was “using the same public relations firm that worked with the Yes on 8 partisans”); Joe Garofoli, Maine Same-Sex Marriage Measure: a Rerun of Prop 8, S.F. CHRON., Oct. 8, 2009 (“The campaign for the measure, known as Question 1, looks like a rerun of last year’s Proposition 8 in California which struck down same-sex marriage. TV ads for the measure are the work of the Sacramento firm of Schubert Flint Public Affairs, which ran the successful California campaign.”). 55. See Susan M. Cover, Gay-Marriage Ad Battle Begins, KENNEBEC J. (Augusta, Maine), Sept. 16, 2009, at B1 (“On Tuesday, gay-marriage opponents released an ad called ‘Consequences,’ a 30-second spot that features Boston College of Law Professor Scott FitzGibbon. He says the new law will lead to lawsuits, that churches could lose their tax-exempt status and that gay marriage could be taught in schools without parents being notified in advance.”); Susan M. Cover, Yes on I Airst First Advertisements, PORTLAND PRESS HERALD (Maine), Sept. 16, 2009, at A10 (to same effect); Joe Garofoli, supra note 54, at A1 (calling the Maine Yes on 1 campaign “a virtual carbon copy of the California effort” and noting that another law professor takes the place of the California professor in the lead ad).


57. The Threat to Marriage, STANDFORMARRIAGEMAINECOM, http://www.standformarriagemaine.com?page_id=119 (last visited Mar. 21, 2012); see also Varona, supra note 56, at 826 & n.94 (noting “‘Yes on I’ advertising making specific, ominous and erroneous predictions about the fate of school children and the threat to the legal tax status and free exercise rights of religious organizations”).
that legalized same-sex marriage; that those with a conscientious objection to homosexual marriage CAN be punished by the government whenever acting on their beliefs comes in conflict with the demands of same-sex "married" couples; and that religious organizations RISK their tax-exempt status if they refuse to accept same-sex marriage as part of their ministry.  

The opponents of civic equality for gay and lesbian citizens succeeded in both Maine and California, where narrow majorities of the electorate were persuaded that same-sex marriage should be outlawed. They then carried their arguments to New York to oppose legislation according same-sex couples the right to marry. The Catholic Diocese of Rockville Centre, for example, objected that if gay and lesbian couples can marry, "[c]hurches could be... [r]equired to teach about same-sex marriage in their religious schools," in addition to being "[s]tripped of their tax exempt status." New York's legislature passed that state's Marriage Equality Act on June 24, 2011, nonetheless, permitting same-sex couples to marry in New York beginning July 24, 2011.

Yet social conservatives continue to insist that permitting same-sex couples to marry places any church that will not solemnize gay or lesbian couples' marriages at risk of losing their tax-exempt status, and their clergy in danger of facing prosecution for committing a hate crime. As we shall see, fears that religious liberty is threatened by the ability of same-sex couples to marry are very poorly grounded.

II. SAME-SEX MARRIAGES POSE NO CREDIBLE THREAT TO RELIGIOUS LIBERTY

When Massachusetts' Supreme Court sustained the right of same-sex couples to marry in Goodridge v. Department of Public Health, the Court was careful to note: "Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in

58. Latest Nasty Mutty Blast Email: "Any Two Will Do"! And Send More $$$/, PAM'S HOUSE BLEND (Oct. 21, 2009, 10:43 AM), http://webcache.googleusercontent.com/search?q=cache:B1rM0uR5aEwJ:209.98.77.35/pamshouseblend/showDiary.do%3FdiaryId%3D13661%26view%3Dprint+%&cd=2&hl=en&ct=clnk&gl=us.
59. See Varona, supra note 56, at 808-15.
62. See, e.g., Christine M. Flowers, Inalienable Rites, PHILA. DAILY NEWS, June 24, 2011, at 21 (suggesting that according full civic equality to gay and lesbian citizens would subject religious institutions to "prosecution for hate speech if, for example, a priest were to condemn homosexuality from the pulpit," and that allowing same-sex couples to legally marry "also puts their tax-exempt status in danger").
63. 798 N.E. 2d 941 (Mass. 2003).
no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage.\textsuperscript{64} The California Supreme Court’s \textit{Marriage Cases} opinion similarly specified that

affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.\textsuperscript{65}

In Maine, the legislation allowing same-sex couples to marry, which was titled \textit{An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom}, explicitly proscribed governmental interference with religious traditions concerning marriage, and protected the right of clergy freely to refrain from solemnizing marriages to which they object.\textsuperscript{66} Marriage equality’s opponents nonetheless portrayed same-sex marriages as a threat to religious liberty in their Maine and California ballot-initiative campaigns—\textit{with} television ads and other materials warning that if same-sex couples could marry, ministers who declined to officiate might face liability, and their churches would lose their tax-exempt status.\textsuperscript{67}

The fears have had no basis in law, for as the First Amendment preserves every religion’s ability to make and follow its own rules concerning its religious rites of marriage within the faith,\textsuperscript{68} no state may force a minister or rabbi to officiate at any wedding to which he or she objects. And any notion

\begin{itemize}
  \item \textsuperscript{64} \textit{id.} at 965 n.29.
  \item \textsuperscript{65} \textit{In re Marriage Cases}, 183 P.3d 384, 451-52 (Cal. 2008); see also \textit{Varnum v. Brien}, 763 N.W. 2d 862, 906 (Iowa 2009) (recognizing same-sex couples’ right to marry in Iowa, but underscoring:

  [r]eligious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person’s religious faith does not lose its meaning as a sacrament or other religious institution.

  \item \textsuperscript{66} It provided an express “[a]ffirmation of religious freedom” as follows.
  \item \textsuperscript{67} See supra text accompanying notes 43-59.
  \item \textsuperscript{68} See, e.g., \textit{Bryce v. Episcopal Church in the Diocese of Colo.}, 289 F.3d 648, 655-59 (10th Cir. 2002).
\end{itemize}
that same-sex couples’ civil marriages could subject churches and clergy to liability for “hate speech” or for “hate crimes”—far-fetched from the beginning—has been put to rest by the Supreme Court’s nearly unanimous holding in *Snyder v. Phelps*, which held that Rev. Fred Phelps and his Westboro Baptist Church have a constitutional right to preach that “God hates fags.” Speech condemning same-sex relationships could not subject the Rev. Phelps and his Westboro Baptist Church to civil liability, let alone criminal.

Neither have the fears for religious liberty had any basis in experience. Though the right to marry clearly is a fundamental right, many liturgical restrictions on who may marry in the religious rites officiated by their clergy have *never* resulted in churches’ loss of tax-exempt status, or in legal liability of clergy when they refuse religious rites of marriage to people who clearly enjoy a legal right to marry.

The religious have every right to consider marriage an institution of divine origin, and to limit marriage in their churches, synagogues, and mosques, as they will. The Roman Catholic Church’s official Catechism states that “God himself is the author of marriage.” That Church’s Congregation for the Doctrine of the Faith insists that marriage “was established by the Creator.” For Catholics, though not for Protestants, marriage between two who have been baptized is a holy sacrament. The Southern Baptist Convention, for its part,

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69. 131 S. Ct. 1207 (2011).
70. See id. Justice Alito alone dissented. Id. at 1222-29 (Alito, J., dissenting).
71. See id.
72. See, e.g., Turner v. Safley, 482 U.S. 78, 95 (1987) (“the decision to marry is a fundamental right”); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (“the right to marry is of fundamental importance for all individuals”); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of choice in matters of marriage and family life is one of the liberties protected by the Due Process clause of the Fourteenth Amendment.”); Loving v. Virginia, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
73. CATECHISM OF THE CATHOLIC CHURCH ¶ 1603 (2d ed. 2000).
75. THE CODE OF CANON LAW IN ENGLISH TRANSLATION c. 1055 ¶ 2 (Canon Law Society of Great Britain & Ireland, trans., Collins & Eerdmans 1983) (“Consequently, a valid marriage contract cannot exist between baptised persons without its being by that very fact a sacrament.”); U.S. CONFERENCE OF CATHOLIC BISHOPS, COMPENDIUM OF THE CATECHISM OF THE CATHOLIC CHURCH ¶ 346 (2005) [hereinafter COMPENDIUM CATECHISM] (“The sacrament of Matrimony establishes a perpetual and exclusive bond between the spouses. God himself seals the consent of the spouses. Therefore, a marriage which is ratified and consummated between baptized persons can never be dissolved.”). For the Protestant position, rejecting marriage as a sacrament, see, for example, JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION 5, 43 (1997) (“Protestants rejected . . . the celebration of marriage as a sacrament.”), “In Lutheran, Calvinist, and Anglican polities alike, a new civil law of marriage
has declared that "marriage was established by God 'in the beginning' to be a permanent one-flesh union." 76 | Endorsing Proposition 8 in September 2008, moreover, the California Southern Baptist Convention's Executive Board declared "marriage was the first institution ordained by God." 77

Yet, marriage in the United States remains a civil institution, with the civil law properly blind to sectarian doctrine. This has never threatened religious institutions' liberty interests, but has enhanced them—by ensuring that each sect may follow its own rules, subject to those of no other.

"No religious ceremony has ever been required to validate a Massachusetts marriage," that state's Supreme Court observed in *Goodridge*. 78 | "From the state's inception, California law has treated the legal institution of civil marriage as distinct from religious marriage," added California's Supreme Court in the *Marriage Cases*. 79 | California's Family Code indeed provides: "No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect." 80

The principle finds deep roots in American legal tradition—going back, indeed, to the Pilgrims' foundational settlement at Plymouth Plantation, where beginning in 1621 marriages were entered not in church, but before a civil magistrate. 81 | Throughout New England, "marriage was regarded as a civil contract and the celebration was performed by a civil magistrate." 82 Not until

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80 | CAL. FAM. CODE § 420(c) (West 2012).

81 | JEREMY DUPERTUIS BANGS, STRANGERS AND PILGRIMS, TRAVELLERS AND SOJOURNERS: LEIDEN AND THE FOUNDATIONS OF THE PLYMOUTH PLANTATION 639-40 (2009); see 1 WILLIAM BRADFORD, HISTORY OF THE PLYMOUTH PLANTATION, 1620-1647, at 216-18 (1912) (recounting the "first marriage in this place, which, according to the laudable custom of the Low-countries . . . was thought most requisite to be performed by the magistrate being a civil thing"); see also id. at 218-19 (observing in 1646 that the Plymouth Pilgrims' policy of removing marriage from the churches, in favor of civil unions before a magistrate, "hath continued amongst, not only them, but hath been followed by all the famous churches of Christ in these parts to this time").

82 | 2 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 134 (1904); see also BANGS, supra note 81, at 640.
1692 did Massachusetts’s statutory law allow that marriages might also be solemnized by clergy. Although clergy today may lawfully solemnize lawful marriages throughout the United States, whose largest religious denomination, the Roman Catholic Church, deems marriage between the baptized a liturgical sacrament, civil marriage remains a nonsectarian, and fundamentally nonreligious, civil institution.

Even nonbelievers have a right to marry. That atheists and agnostics thus enjoy the same legal right to marry that is enjoyed by those who believe marriage a divine institution poses no threat to anyone’s religious liberty. The atheist’s freedom to marry does not impinge upon the religious liberty of Southern Baptists to consider marriage an institution ordained by God, or even of Roman Catholics for whom marriage of the baptized is a sacrament. The agnostic’s right to marry does not threaten the religious liberty of Mormons to be married in their own wardhouses and temples and by their own rules. Neither does the agnostic or atheist’s right to marry impair the liberty of churches or their clergy to exclude nonbelievers from religious rites of marriage.

No one thinks that nonbelievers may sue any church or clergy that refuses them access to religious rites of marriage, or that any church or clergy could lose its tax-exempt status or face civil or criminal liability for restricting religious marriage rites to believers. Religious liberty means not only that no one may be legally required to confess a faith, but also that no atheist or agnostic couple may force any church or synagogue to open its doors to them. Nor, however, may those who deem marriage a divine institution “protect” their religious beliefs and practices by legislating any test of faith, or of religious propriety, to deprive nonbelievers or the unorthodox of the right to marry on their own terms.

That people of different faiths may marry one another similarly poses no threat to the religious liberty of faith traditions and clergy that reject, discourage, or place limits on interfaith marriages. For most of the twentieth century, for example, the Roman Catholic Church’s Code of Canon Law

(“The introduction of civil marriage registration at Plymouth established a pattern that inspired imitation . . . in the later colonies of New England.”).


85. U.S. CONFERENCE OF CATHOLIC BISHOPS, UNITED STATES CATHOLIC CATECHISM FOR ADULTS 281 (2006) [hereinafter UNITED STATES CATHOLIC CATECHISM FOR ADULTS] (“By Christ’s will, Marriage is one of the Seven Sacraments.”).

86. See RESOLUTION, supra note 76; Press Release, supra note 77.

87. UNITED STATES CATHOLIC CATECHISM FOR ADULTS, supra note 85, at 281.

proscribed interfaith marriages.\textsuperscript{89} Considerably liberalized in 1983,\textsuperscript{90} official Catholic doctrine still restricts interfaith marriage by requiring the Church’s “express permission” for a Catholic to enter a “mixed marriage” with a non-Catholic Christian, and “an express dispensation” for a Catholic to enter a “disparity-of-cult” marriage with a non-Christian—without which any marriage to a non-Christian is deemed invalid.\textsuperscript{91} Yet the religious liberty of America’s Catholics neither requires, nor could it justify, any state’s legal enforcement of their Church’s rules regulating interfaith marriages.

In Judaism too, religious rules may restrict mixed-faith marriages. The

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  \item 89. Canon 1060 of the 1917 Code of Canon Law stated: “Most severely does the Church prohibit everywhere that marriage be entered into by two baptized persons, one of whom is Catholic, and the other belonging to a heretical or schismatic sect; indeed, if there is a danger of perversion to the Catholic spouse and children, that marriage is forbidden even by divine law.” And Canon 1070 §1 declared marriage of a Catholic to a non-Christian to be a nullity: “That marriage is null that is contracted between a non-baptized person and a person baptized in the Catholic Church or converted to her from heresy or schism.” 1917 Code c.1060, 1070, §1. See Michael G. Lawler, Interchurch Marriages: Theological and Pastoral Reflections, in Marriage in the Catholic Tradition: Scripture, Tradition, and Experience 222 (Todd A. Salzman et al. eds., Crossroad Publ. Co., 2004) (quoting Canon 1060 of the 1917 Code of Canon Law: “The church everywhere most severely prohibits the marriage between two baptized persons, one of whom is a Catholic, the other of whom belongs to a heretical or schismatic sect.”); see also Paul H. Besanceney, Interfaith Marriages: Who and Why 115-18 (1970); Sacred Congregation for the Doctrine of the Faith, Instruction on Mixed Marriage, March 8, 1966 (1966); Francis Schenk, The Matrimonial Impediments of Mixed Religion and Disparity of Cult 82-99 (1929).
  \item 91. Catechism of the Catholic Church § 1635 (2d ed. 2000) (“According to the law in force in the Latin Church, a mixed marriage needs for liceity the express permission of ecclesiastical authority. In case of disparity of cult an express dispensation is required for the validity of the marriage.”) (emphasis in original); The Code of Canon Law in English Translation, supra note 75, at c. 1086 § 1 (stating that marriage is invalid when one of the two persons was baptized in the Catholic Church or received into it and has not by a formal act defected from it, and the other was not baptized); id. at c. 1124 (“Without express permission of the competent authority, a marriage is prohibited between two baptized persons, of whom one was baptised in the Catholic Church or received into it after baptism and has not defected from it by a formal act the other of whom [belongs] to a Church or ecclesial community not in full communion with the Catholic Church.”); see also Compendium Catechism, supra note 75, at § 345 (“A mixed marriage (between a Catholic and a baptized non-Catholic) needs for liceity the permission of ecclesiastical authority. In a case of disparity of cult (between a Catholic and a non-baptized person) a dispensation is required for validity. In both cases, it is essential that the spouses do not exclude the acceptance of the essential ends and properties of marriage. It is also necessary for the Catholic party to accept the obligation, of which the non-Catholic party has been advised, to persevere in the faith and to assure the baptism and Catholic education of their children.”); United States Catholic Catechism for Adults, supra note 85, at 289 (“The term mixed marriage refers to a union between a Catholic and a baptized non-Catholic. With appropriate permission, a Catholic can marry a baptized non-Catholic . . . . A marriage between a Catholic and a non-baptized person, which is an interfaith marriage and is not a sacramental marriage, can present even greater problems for a marriage.”).
\end{itemize}
Orthodox, Conservative, and Reform Movements generally have interpreted Hebrew Scripture and Jewish tradition to prohibit interfaith marriages. The Rabbinic tradition proscribing mixed-faith marriage is a longstanding one,

92. See Louis M. Epstein, Marriage Laws in the Bible and the Talmud 145-219 (1942) (offering a scholarly Conservative perspective); Maurice Lamm, The Jewish Way in Love and Marriage 48-65 (1991) (offering a somewhat polemic Orthodox perspective); Walter Jacob, Reform Judaism and Mixed Marriage, in 90 Yearbook of the Central Conference of American Rabbis 86-102 (Walter Jacob, ed., Central Conference of American Rabbis 1980), reprinted in American Reform Responsa: Jewish Questions, Rabbinic Answers 445-65 (1983), and in Marriage and Its Obstacles in Jewish Law 213-40 (Walter Jacobs & Moshe Zemer eds., Freehot Inst. of Progressive Halakah and Rodef Shalom Press 1999) (offering a Reform perspective); see also, e.g., David S. Ariel, What Do Jews Believe? The Spiritual Foundations of Judaism 129 (1996) ("Judaism is clearly and unequivocally opposed to intermarriage between a Jew and a non-Jew."); Elliot N. Dorff & Arthur Rosett, A Living Tree: The Roots and Growth of Jewish Law 469 (1988) ("From the very beginning of Jewish group identity, Jewish marriage has been endogamous: Jews are allowed to marry only other Jews."); Alfred J. Kolatch, The Second Jewish Book of Why 120 (2000) ("The prohibition of marriages between Jews and non-Jews is biblical in origin. Deuteronomy 7:3 sets forth the law clearly: 'You shall not intermarry with them; do not give your daughters to their sons or take their daughters for your sons."); Ben-Zion Schereschewsky, Mixed Marriage, in The Principles of Jewish Law 376-77 (Menachem Elon ed., Keter Publishing House 1975) ("From the biblical passage (Deut. 7:3) 'neither shalt thou make marriage with them: thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son,' the sages inferred that marriage with a non-Jew is forbidden as a negative precept by the Torah."). Very few American rabbis will officiate at interfaith ceremonies.

George Robinson, Essential Judaism: A Complete Guide to Beliefs, Customs & Rituals 168 (2000). Though some Reform and Reconstructionist rabbis will officiate marriages of interfaith couples, it has been said "the vast majority of Reform rabbis abide by the 1909 statement of the Central Conference of American Rabbis (reaffirmed in 1947), which condemns intermarriage as being contrary to the traditions and interests of the Jewish religion and hence a practice that should be discouraged by the American rabbinate. The Committee on Jewish Law and Standards of the Rabbinical Assembly (Conservative) does not permit its members to officiate at the marriage of a Jew to a non-Jew, and anyone who does is subject to expulsion.

Alfred J. Kolatch, The Second Jewish Book of Why 121 (2000). See also Dana Evan Kaplan, Contemporary American Judaism: Transformation and Renewal 197-98 (2009) (noting that although some Reform and Reconstructionist rabbis are beginning to officiate at interfaith weddings, Conservative rabbis still are "prohibited from officiating at interfaith weddings" under penalty of expulsion from their Rabbinical Assembly, and that "Orthodox rabbis would be violating the halacha if they officiated, and could also face sanctions from the [Rabbinical Council of America] or other Orthodox rabbinical groups."); Marc Lee Raphael, Judaism in America 111 (2003) (in the author's 1998 survey of Conservative and Reform Synagogues in the mid-Atlantic region of the United States, "[a]ll Conservative rabbis, and the majority of Reform rabbis, were opposed to intermarriage [and] refused to officiate at such marriages"). But see Elliot N. Dorff & Arthur Rosett, A Living Tree: The Roots and Growth of Jewish Law 344 (1988) ("In 1975 the convention of Reform rabbis took a stronger stance against the intermarriage of Jews and non-Jews than many observers had expected; but it failed to prohibit Reform rabbis from performing such wedding ceremonies, and a significant percentage of them still do."); Joseph Telushkin, Jewish Literacy: The Most Important Things to Know About the Jewish Religion, Its People, and Its History 394 (1991) (asserting that "although the Reform rabbinate has voted disapproval of its members performing intermarriages, about 50 percent of Reform rabbis do so, at least on occasion").
honored for millennia, and grounded in Scripture. The Orthodox, in particular, faithfully treat the marriage of a Jew to a non-Jew as a nullity. Yet America’s Jews have not contended their religious liberty needs the protection of state or federal laws barring civil marriages of interfaith couples. And neither their rabbis nor their synagogues have faced any legal liability or loss of tax-exempt status for limiting religious rites of marriage as they choose.

Islamic law is widely understood to prohibit interfaith marriages between a Muslim woman and non-Muslim man, and also to prohibit marriage of any Muslim to a polytheist or pagan. Some nations’ governments have sought to

93. See Deuteronomy 7:3-4 (JPS Tanakh) (“You shall not intermarry with them: do not give your daughters to their sons or take their daughters for your sons. For they will turn your children away from Me to worship other gods, and the Lord’s anger will blaze forth against you and He will promptly wipe you out.”); see also Genesis 24:3-4; Exodus 34:11-16; Joshua 23:11-13; Ezra 9-10; Nehemiah 10:30-31 (JPS Tanakh) (“join with their noble brothers, and take an oath with sanctions to follow the Teaching of God, given through Moses, the servant of God, and to observe carefully all the commandments of the Lord our Lord, His rules and laws. Namely: We will not give our daughters to the people of the land, or take their daughters for our sons.”) (internal quotation marks omitted); Nehemiah, 13:23-30; Malachi 2:11-12. See generally LAMM, supra note 92, at 50-51 (summarizing scriptural proscriptions); Walter Jacob, Reform Judaism and Mixed Marriage, in MARRIAGE AND ITS OBSTACLES IN JEWISH LAW, 213, 214-17 (Walter Jacob & Moshe Zeitler eds., Freehof Inst. of Progressive Halakah & Rodef Shalom Press 1999).

94. ADIN STEINSALTZ, THE ESSENTIAL TALMUD 136 (1976) (a purported marriage of Jew to non-Jew simply “is not considered a legal marriage”); LAMM, supra note 92, at 53 (“Interfaith marriage is no marriage; it is prohibited and it is also void.”).

95. See generally YOHANAN FRIEDMAN, TOLERANCE AND COERCION IN ISLAM: INTERFAITH RELATIONS IN MUSLIM TRADITION 160-93 (2003). See, e.g., MAULANA ABUL A’ALA MAUDDOodi, THE LAWS OF MARRIAGE AND DIVORCE IN ISLAM 11-12 & n.* (2d ed. 1993) (“Muslims, both men and women, are forbidden to have marital relations with non-Muslims who are not believers in the Scriptures . . . As for the Jews and Christians (people of the Scripture) Islamic Law allows marriage with Jewish and Christian women,” but “Muslim women are not allowed to marry men from among the people of the scripture.”); MOHANLAL DAYALJI MANEK, HANDBOOK OF MAHOMEDAN LAW (MUSLIM PERSONAL LAW) (5th ed. 1956) (“A Muslim woman cannot contract a valid marriage with a non-Muslim. A Muslim male can contract a valid marriage not only with a Muslim woman, but also with a Kitabia, that is, a Christian or Jewess, but not with an idolatress (e.g., a Hindu) or a fire-worshipper.”); CHRISTINA HUDA DODGE, THE EVERYTHING UNDERSTANDING ISLAM BOOK: A COMPLETE AND EASY TO READ GUIDE TO MUSLIM BELIEFS, PRACTICES, TRADITIONS, AND CULTURE 219-20 (2003) (“Under no circumstances is a Muslim, man or woman, allowed to marry a polytheist. However, under certain circumstances Muslim men are permitted to marry Jewish or Christian women: ‘Lawful for you in marriage are not only chaste women who are believers, but chaste women from among the people of the book revealed before your time, when you give them their due dowers’ ([QUR’AN] 5:5). . . . Muslim women may marry only Muslim men. ‘They are not lawful wives for the unbelievers, nor are the unbelievers lawful husbands for them’ ([QUR’AN] 60:11). Muslims perceive this rule as a protection for the woman in marriage. If a Muslim woman were to marry outside the faith, her husband would neither understand nor follow Islamic teachings about fair treatment of women, her rights and responsibilities. Such a marriage would put her at risk to abuse or the pressure to give up her faith.”); SHEIKH ABDURRAGHIEM SALLIE, THE BOOK ON MUSLIM MARRIAGE: KITAB UN-NIKAH 107-12 (2001) (“Marriage between Muslims and idolworshippers or Polytheist[s] are prohibited . . . It is permissible to marry a Muslim to a
defend the Muslim faith by incorporating these rules in their civil and even criminal law.\textsuperscript{96} But the religious liberty of America's Muslims cannot reasonably be said either to depend upon, or to warrant, enactment of state or federal laws imposing similar restrictions.

In fact, governmental adoption and enforcement of such rules would grievously abridge the religious-liberty interests not only of non-Muslims, but also of Muslims who do not care to be bound by them. Our courts have held that a Muslim government's enforcement of such rules amounts to religious persecution, as does government-sponsored discrimination against interfaith couples and their children.\textsuperscript{97} If governmental discrimination against mixed-faith couples (because some believe that their marriages violate God's law) thus amounts to religious persecution abroad, then governmental discrimination at home against same-sex couples (because some believe their marriages defy God's law) might similarly amount to religious persecution.

Whether or not it does, the fact that interfaith marriages are both permitted and legally protected in the United States poses no threat to the religious liberty of faith traditions that prohibit, restrict, or deny recognition to such marriages. No priest, rabbi, or imam can be required to officiate at an interfaith wedding.


\textsuperscript{97} See, Bandari v. INS, 227 F.3d 1160, 1168 (9th Cir. 2000) (in a case involving Muslim-Christian interfaith dating in Iran, holding that "persecution aimed at stamping out an interfaith marriage is without question persecution on account of religion") (quoting Maini v. INS, 212 F.3d 1167, 1175 (9th Cir. 2000)). See also Faruk v. Ashcroft, 378 F.3d 940, 943-44 (9th Cir. 2004) (Muslim-Christian interfaith marriage in Fiji); Maini v. INS, 212 F.3d 1167, 1175 (9th Cir. 2000) (Sikh-Hindu interfaith marriage in India); cf. Baballah v. Ashcroft, 367 F.3d 1067, 1077 (9th Cir. 2004) (applying Maini).
No church, synagogue, or mosque has lost its tax-exempt status for refusing religious marriage rites to an interfaith couple. No one’s religious-liberty interests are threatened by the fact that interfaith couples may marry in violation of God’s law as understood by conservative Catholics, Orthodox Jews, or mainstream Muslims.

In the United States, a legally divorced man or woman may lawfully marry again. This poses no threat to the liberty of Roman Catholics, whose Church both pronounces divorce “a grave offense against natural law,” and condemns remarriage by, or to, a divorced person as “public and permanent adultery.” The Roman Catholic Church insists that divorced people who remarry necessarily “find themselves in a situation that objectively contravenes God’s law.” “The Church, since she is faithful to her Lord, cannot recognize the union of people who are civilly divorced and remarried.” Roman Catholics who divorce and remarry “cannot take sacramental absolution, take Holy Communion, or exercise certain ecclesial responsibilities as long as their situation, which objectively contravenes God’s law, persists.”

98. The *Catechism of the Catholic Church* explains:

*Divorce* is a grave offense against the natural law. It claims to break the contract, to which the spouses freely consented, to live with each other till death. Divorce does injury to the covenant of salvation, of which sacramental marriage is the sign. Contracting a new union, even if it is recognized by civil law, adds to the gravity of the rupture: the remarried spouse is then in a situation of public and permanent adultery:

If a husband, separated from his wife, approaches another woman, he is an adulterer because he makes that woman commit adultery; and the woman who lives with him is an adulteress, because she has drawn another’s husband to herself. *Catechism of the Catholic Church* § 2384 (2d ed. 2000); see id. § 2382 (“The Lord Jesus insisted on the original intention of the Creator who willed that marriage be indissoluble.”).

99. The *Catechism* elaborates:

Today there are numerous Catholics in many countries who have recourse to civil divorce and contract new civil unions. In fidelity to the words of Jesus Christ – “Whoever divorces his wife and marries another, commits adultery against her; and if she divorces her husband and marries another she commits adultery.” [Mark 10:11-12] – The Church maintains that a new union cannot be recognized as valid, if the first marriage was. If the divorced are remarried civilly, they find themselves in a situation that objectively contravenes God’s law. Reconciliation through the sacrament of Penance can be granted only to those who have repented for having violated the sign of the covenant and of fidelity to Christ, and who are committed to living in complete continence. *Catechism of the Catholic Church* § 1650 (2d ed. 2000).

100. *Compendium Catechism*, supra note 75, at § 349; see also *United States Catholic Catechism for Adults*, supra note 85, at 287 (“In the case of those who have divorced civilly and remarried . . . the Church considers the second marriage invalid”).

101. *Compendium Catechism*, supra note 75, at § 349; see also *United States Catholic Catechism for Adults*, supra note 85, at 290 (“The remarriage of persons divorced from a living, lawful spouse is not permitted by God’s law as taught by Christ. They remain members of the Church but cannot receive Holy Communion.”). Pope Benedict XVI reportedly has “dashed the hopes of those who begged him to let Catholics who have divorced and remarried without getting an annulment take Communion.” David Van Bienen & Jeff Israely, *Getting to Know Him: How the Pope is Showing Hints of Being His Own Man*, TIME, Aug. 8, 2005, at 36, 38.
Neither may they sue the Church for enforcing these rules. No one may compel a Catholic priest either to solemnize a wedding at odds with his Church's doctrine, or to give communion to those whom the civil law recognizes as lawfully divorced and remarried. No Catholic church has lost its tax-exempt status for denying anyone its religious rites of marriage and communion. The civil right of the civilly divorced to remarry poses no threat to the religious liberty of Catholics.

It is hard to fathom how civil marriages of same-sex couples could pose a greater threat to Roman Catholics' religious liberty than do the civil marriages of many millions of Americans who have legally divorced and remarried in contravention of the Church's clear doctrine. The Roman Catholic Church appears to regard both civil marriages of the legally divorced and remarried, and civil marriages of same-sex couples, as equally null and void. It directs divorced persons and homosexuals alike to lead lives of chastity and celibacy. That people are able to violate these rules by marrying outside the Roman Catholic Church cannot be said to threaten the Church's legitimate liberty interests, or to place it in danger of losing its tax-exempt status.

Recognizing same-sex couples' legal right to marry threatens religious liberty of those who reject such marriages no more than recognizing the legal right of mixed-race couples in *Perez v. Sharp* and *Loving v. Virginia* has impaired the religious liberty of those who reject interracial unions as contrary to God's law. It should be remembered that the trial judge in *Loving* ruled that Virginia's law against interracial marriage reflected the will of an "Almighty God" who "did not intend for the races to mix." Virginia's Supreme Court itself had held in 1955 that the law forbidding interracial marriage was "clearly

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102. Compare *Catechism of the Catholic Church* ¶1650 (with respect to the civilly divorced "a new union cannot be recognized as valid, if the first marriage was"), and *Compendium Catechism*, supra note 75, at ¶349 ("The Church... cannot recognize the union of people who are civilly divorced and remarried."); *with Congregation for the Doctrine of the Faith, Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* ¶2 (2003) ("marriage exists solely between a man and a woman"); *and John F. Harvey, Homosexuality and the Catholic Church: Clear Answers to Difficult Questions* 65 (2007) (asserting that "the Holy See refuses to use the term 'gay marriage' because is no way is a same-sex union a true marriage" under Roman Catholic doctrine).

103. Compare *Catechism of the Catholic Church* ¶1650 (reconciliation possible for divorced persons only if they have repented and "are committed to living in complete continence"), *with Catechism of the Catholic Church* ¶2359 ("Homosexual persons are called to chastity").


106. The Supreme Court quotes the trial judge’s opinion: Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix. *Loving*, 388 U.S. at 3.
divine" in its origin, a view then in line with longstanding precedent.

The Church of Jesus Christ of Latter-day Saints, which today vigorously opposes permitting same-sex couples to marry, for most of its history—indeed, until June of 1978—both barred blacks from its priesthood, and condemned interracial marriage between black and white. Its doctrine was controversial, but no one could force the Church to let black men enter its priesthood, and no interracial couple could insist upon being married in a Mormon meetinghouse or temple. The Church faced no legal liability, and it suffered no loss of its tax-exempt status, for refusing Mormon rites of marriage to mixed-race couples.

The Mormon Church itself observed, at the time, that "matters of faith, conscience, and theology are not within the purview of the civil law." Church doctrine "affecting those of the Negro race who choose to join the church falls wholly within the category of religion," the First Presidency declared, and "has no bearing upon matters of civil rights." "In no case or degree does it deny to the Negro his full privileges as a citizen of the nation." The Church quite clearly was protected by the First Amendment when it limited marriage on the basis of race—even if it could not impose its religious doctrine on others as civil law.

Thus, the Mormon First Presidency itself recognized that allowing mixed-race couples to marry outside the Mormon Church presented no threat to Mormons' religious liberty to prohibit interracial marriages within the Church. Allowing same-sex couples to marry outside the Mormon Church similarly poses no threat to Mormons' religious liberty.

Experience demonstrates that faith traditions have placed many restrictions on liturgical marriages, denying religious marriage rites to people who clearly enjoy a civil right to marry. Yet none has faced legal liability, and no church

111. Id.
112. Id.
113. Id.
114. See id.
has lost its tax-exempt status as a consequence. There is no reason to think that same-sex couples’ legal right to marry could pose a greater threat to religious traditions whose religious liturgies cannot bless their unions than the marriages of interfaith couples, mixed-race couples, or the legally divorced, have posed to religious traditions whose religious liturgies cannot bless their unions.

III. TAX EXEMPTIONS LOST?: BOB JONES UNIVERSITY AND THE OCEAN GROVE CAMP MEETING ASSOCIATION

Though no church has lost tax-exempt status for refusing to open its doors to marriages it cannot sanction, conservative accounts of the threat that same-sex marriages supposedly pose to religious liberty often employ two cases to illustrate how churches can indeed lose their tax-exempt status when same-sex couples are permitted to marry.

In the first, Bob Jones University v. United States, the Supreme Court sustained an IRS policy denying tax-exempt status not of churches, but of schools that discriminate on the basis of race. In the second, New Jersey officials challenged a real-estate property-tax exemption when the Ocean Grove Camp Meeting Association ("Ocean Grove") denied its residents access to their own community's public facilities because they wished to celebrate a lesbian civil-commitment ceremony. Neither Bob Jones nor Ocean Grove suggests a serious threat to America's churches.

In Bob Jones, the Supreme Court decided companion cases in which two religious schools challenged an IRS policy denying the tax exemption for nonprofit educational institutions to schools that openly discriminated on the basis of race. The sole question before the Court was "whether petitioners, nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations under §501(c)(3) of the Internal Revenue Code of 1954."

One of the schools was Bob Jones University which, though unaffiliated with any religious denomination or church, insisted that the Bible forbids interracial dating and enforced this proscription against its students. The other was Goldsboro Christian Schools, of Goldsboro, North Carolina, which was organized and incorporated in 1963, in the face of public school desegregation mandated under Brown v. Board of Education, and which said it excluded black students because mixing of the races violates God's law mandating racial purity.

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118. Id. at 580.
119. Id. at 583 & n.6.
It appears that Goldsboro Christian Schools was but one of the "approximately 2500 private schools (also called private academies or Christian schools) begun in the South as white-only schools in response to the desegregation of public schools." These schools' operation in many locales frustrated the Supreme Court's ruling in Brown v. Board of Education that public schools be desegregated, as thousands of private segregationist schools were formed, withdrawing perhaps three-quarters of a million white students from the public schools. Some, like Goldsboro Christian Schools, were affiliated with racist churches.

In Norwood v. Harrison, when the Supreme Court ruled in 1973 that states could not subsidize segregationist private schools by giving their students free textbooks, it observed that in one Mississippi county facing desegregation "all white children were withdrawn from public schools and placed in a private academy housed in local church facilities and staffed by the principal and 17 high school teachers of the county system, who resigned in mid-year to accept jobs at the new academy." Discrimination in the segregationist academies, the Court observed, "exerts a pervasive influence on the entire educational process." States were thus barred from assisting the segregationist academies

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122. "The Southern Regional Council estimated that 300,000 students attended such schools in 1969, but by 1970, after the Alexander v. Holmes County Board of Education [396 U.S. 1218] (1969) decision, it is estimated that half a million students were in segregationist academies. By 1976 Nevin and Bills estimated that three-quarters of a million students were in over 3,000 such schools." RAFFEL, supra note 120, at 236. See generally DAVID NEVIN & ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH (1976).
123. From the district court's opinion, we learn that "[t]he Second Baptist Church of Goldsboro, an independent, fundamentalist institution, figured prominently" in the Goldsboro Christian Schools' "establishment, and has continued to figure prominently in its operation." Goldsboro Christian Sch., Inc. v. United States, 436 F. Supp. 1314, 1316 (E.D.N.C. 1977). The Supreme Court's opinion tells us that "[a]ccording to the interpretation espoused by Goldsboro [Christian Schools], race is determined by descendance from one of Noah's three sons — Ham, Shem, and Japheth," and "[c]ultural or biological mixing of the races is regarded as a violation of God's command." Bob Jones, 461 U.S. at 583 n.6. For one of many popular expressions of this view see CAREY DANIEL, GOD THE ORIGINAL SEGREGATIONIST AND SEVEN OTHER SEGREGATION SERMONS (c. 1957). Time magazine reported in its November 5, 1956, issue that the Southern Baptist "Rev. Carey Daniel, pastor of West Dallas' First Baptist Church and brother of Texas' Democratic Senator (and candidate for governor) Price Daniel, offered to turn his church buildings into an all-white school if integration should be forced upon Dallas' public schools." Religion: Words & Works, TIME, Nov. 5, 1956, at 70, available at http://www.time.com/time/magazine/article/0,9171,865596,00.html#ixzz16p7xi000.
125. Id. at 468 n.9 (citing United States v. Tunica Cnty. Sch. Dist., 323 F. Supp. 1019 (N.D. Miss. 1970), aff'd, 440 F.2d 377 (5th Cir. 1971)).
126. Id. at 469.
with tuition grants or with free textbooks.  

Black children and parents whose public schools in Mississippi were hobbled by the exodus of white students to private academies filed suit against the IRS in 1970, obtaining a preliminary injunction barring it from according tax-exempt status to segregationist schools. In the midst of litigation, the IRS determined segregationist schools were something less than “charitable,” warranting a denial of the tax-exempt status accorded to other educational nonprofits—even if they called themselves “Christian schools” and sincerely believed that God commanded that races shall not mix.

In Bob Jones, the Supreme Court ruled, over Justice Rehnquist’s dissent, that the IRS got it right. “Given the stress and anguish of the history of efforts to escape from the shackles of the ‘separate but equal’ doctrine of Plessy v. Ferguson,” Chief Justice Burger wrote for the Court, “it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising ‘beneficial and stabilizing influences in community life,’ or should be encouraged by having all taxpayers share in their support by way of special tax status.” “Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy.”

Nothing in the opinion suggests that churches’ tax-exempt status could be revoked for discriminating on the basis of race. To the contrary, the Supreme Court emphasized: “We deal here only with religious schools—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education.”

The Brown v. Board line of precedent, moreover, had required desegregation of schools that were long segregated by law. It did not require that churches or synagogues be racially integrated. And it appears that no American church or synagogue has ever been threatened with loss of tax-exempt status on the ground that it is racially segregated. None has lost tax-exempt status for failing to welcome people of different races or for preaching against racial mixing, let alone for preaching against homosexuality. Any

127. Id. at 464-65 & n.6, 469.
130. Bob Jones, 461 U.S. at 595 (internal quotation omitted).
131. Id.
132. Id. at 604 n.29.
133. Though it appears that the IRS challenged the Second Baptist Church of Goldsboro’s tax-exempt status when it sought to protect the Goldsboro Christian School’s tax-exempt status by formally absorbing it and assuming the operation of the segregated school, see Perry Dane, The Public, The Private, and the Sacred: Variations on a Theme of Nomos and Narrative, 8 CARDOZO STUD. L. & LITERATURE 15, 31 & n.94 (1996), that action obviously was based on the school’s continuing discrimination as an educational institution
notion that same-sex couples' civil marriages would suddenly put churches’
tax-exempt status at risk is plain fantasy.

The Becket Fund asserts in amicus curiae briefs, however, that in the
Ocean Grove case the State of New Jersey “has withdrawn the property tax
exemption of a beach-side pavilion owned and operated by a Methodist
Church, because the Church refused on religious grounds to host a same-sex
civil union ceremony.” That is not quite true.

In fact, the property was not owned by “a Methodist Church” at all, but by
the Ocean Grove Camp Meeting Association, whose trustees are required to be
Methodists, and which “owns all of the land in the seaside community of Ocean
Grove, New Jersey,” whose population the 2010 Census placed at 3342.

Ocean Grove leases properties in the resort community, advertising on the
Internet that it “welcomes everyone to enjoy this beautiful, seaside community
without discrimination based on race, gender, income level, education, religion,
or country of origin.” It obtained a New Jersey “Green Acres” real-property
tax exemption for the community’s beachfront boardwalk and pavilion as
rather than the church’s discrimination as a religious organization. It has not produced
further rulings that churches’ tax exemptions may be revoked when churches discriminate in
admitting people to fellowship, or otherwise in offering liturgical services.

134. Brief Amicus Curiae of The Becket Fund for Religious Liberty in Support of
Perry v. Schwarzenegger), 630 F.3d 898 (2011) (No. 10-16696) 2010 WL 4075746; see also
Brief Amicus Curiae of The Becket Fund for Religious Liberty in Support of Defendant-
Intervenors at 9, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-
CV-2292 VRW) 2010 WL 97697 (“In New Jersey, for example, the state has withdrawn the
property tax exemption of a beach-side pavilion owned and operated by a Methodist Church,
because the Church refused on religious grounds to host a same-sex civil union ceremony.”).

(3d Cir. 2009).

136. See U.S. CENSUS BUREAU, Profile of General Population and Housing
Characteristics 2010, for Ocean Grove, New Jersey, available at
http://factfinder2.census.gov/faces/tables services/jsf/pages/productview.xhtml?pid=DEC_10_
DP_DPDP1&prodType=table.

137. This is from the “Frequently Asked Questions” page of the Ocean Grove Camp
Meeting Association (“OGCMA”):
Q. Does the OGCMA discriminate in offering land leases?
A. No. The OGCMA welcomes everyone to enjoy this beautiful, seaside community without
discrimination based on race, gender, income level, education, religion, or country of origin.

Frequently Asked Questions, OCEAN GROVE CAMP MEETING ASS’N,
publicly stated policy of nondiscrimination has drawn many gay and lesbian residents. “In
the past couple of decades,” Professor Marc R. Poirier reports, “the population of Ocean
Grove changed, with many lesbian and gay couples moving there.” Marc R. Poirier, Gender,
Place, Discursive Space: Where is Same-Sex Marriage?, 3 FLA. INT’L U. L. REV. 307, 328
(2008). “By the mid-1990s, gay and lesbian couples were moving in, and by the time the
controversy arose, about one-fourth of the residents were estimated to be same-sex couples.”
Marc R. Poirier, Microperformances of Identity: Visible Same-Sex Couples and the
public facilities to be held open for all to enjoy on an equal basis. A lesbian couple, who were long-term members of the residential community, thought that included them, so they applied to use the pavilion for a civil-commitment ceremony.

Ocean Grove denied its lesbian residents the use of their own residential community’s supposedly public facilities because Ocean Grove’s trustees objected to same-sex civil unions. Because the property in question no longer was held open to all persons on an equal basis, New Jersey officials found probable cause to conclude that it no longer qualified for the “Green Acres” tax exemption accorded to properties made available for nondiscriminatory public use.

The case involved neither a Methodist church, as The Becket Fund’s briefs state, nor same-sex couples’ right to marry—which New Jersey has yet to recognize. No church’s tax-exempt status was revoked, or even questioned. The case dealt with a beachfront resort community’s loss of a tax exemption granted to it exclusively on the basis that it would hold the exempt property open for public use without discrimination. Churches’ tax exemptions are not contingent upon such terms.

Thus, Bob Jones and Ocean Grove give us no reason to think that same-sex couples’ ability to marry could put any church’s tax-exempt status at risk.

CONCLUSION: THE REAL THREAT TO RELIGIOUS LIBERTY

The real threat to religious liberty rests not in the ability of citizens to marry in contravention of one or more sects’ doctrines, but in seeking to “protect” those religious doctrines by imposing them as law controlling all.

Religious liberty was not enhanced in California or Maine by codifying certain faith traditions’ restrictions barring same-sex unions, not unless “religious liberty” means freedom to force others to follow your own religious rules. It clearly does not. Our “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” Under our Constitution, “government may not promote or affiliate itself with any religious doctrine.” Thus, the Supreme Court readily invalidates state laws barring the teaching of Darwinian evolution or requiring instruction of “creation science,” because

139. Poirier, Microperformances of Identity, supra note 137, at 76.
140. BERNSTEIN FINDING OF PROBABLE CAUSE, No. PN34XB-03008.
they seek to codify religious doctrine. It properly keeps religious doctrine out of our public schools. And it vigorously protects religious organizations’ “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” The State cannot constitutionally choose to impose the traditions of one religion on members of another; it cannot say what is kosher, or holy, or ordained by God.

A state cannot, consistent with the First Amendment, require Orthodox rabbis or Roman Catholic priests to solemnize interfaith marriages at odds with their own traditions. Yet neither can a state honor some faiths’ traditional restrictions on liturgical marriages by making them law. Our constitution’s religion clauses bar the state both from interfering with religious judgments on these matters—and also from imposing those protected religious judgments on others. Different religious traditions are constitutionally entitled to adopt differing views about appropriate conduct and relations between the sexes, what one may eat, and who one may love and marry. The State cannot constitutionally choose to impose the traditions of one religion on members of another.

Some faith traditions—the United Church of Christ (U.C.C.), Metropolitan Community Churches (M.C.C.), and the Unitarian Universalist Association (U.U.A.) for example—welcome same-sex couples to marry in religious rites in their churches. The religious liberty of Catholics and Southern Baptists and Mormons is not enhanced by placing those marriages outside the law. But the liberty of Unitarian Universalists and of M.C.C. and U.C.C. Christians is greatly impaired when the other sects’ religious doctrines are “protected” by denying legal recognition to same-sex marriages celebrated in their own churches.

Perez v. Sharp starkly frames the religious-liberty issue. When California law prohibited a mixed-race marriage of two Roman Catholics whose Church blessed matrimony between believers of different races, the mixed-race couple argued

that the statutes in question are unconstitutional on the grounds that they prohibit the free exercise of their religion and deny to them the right to participate fully in the sacraments of that religion. They are members of the Roman Catholic Church. They maintain that since the church has no rule forbidding marriages between Negroes and Caucasians, they are entitled to

144. See, e.g., Lee v. Weisman, 505 U.S. 577, 618-19 (1992); Epperson, 393 U.S. at 108-09.
147. 198 P.2d 17 (Cal. 1948).
receive the sacrament of matrimony.148

Justice Traynor wrote for a plurality of three justices that if “the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well.”149 Justice Edmonds provided the fourth vote, making a precedential majority, by holding that the right to marry “is protected by the constitutional guarantee of religious freedom.”150 Outlawing a marriage between two Catholics of different races violated their religious freedom.151

Surely, Unitarian Universalists, members of the United Church of Christ, and members of the Metropolitan Community Churches, whose faith traditions bless marital unions without regard to the contracting parties’ race or sex, are entitled to the same consideration as Catholics, whose interracial unions Perez holds are constitutionally protected. For if the First Amendment’s “free exercise” and “establishment” clauses mean anything, it is that a state may not discriminate in dispensing fundamental civil rights—such as the right to marry the spouse of one’s choice—on the basis of other people’s theological sensibilities.

148. Id. at 18; see generally PASCOE, supra note 108, at 207-23.
149. Perez, 198 P.2d at 18.
150. Id. at 34 (Edmonds, J., concurring).
151. See id.; see also PASCOE, supra note 108, at 220, 223 (noting that only “the religious freedom claim” gained four votes, providing the “narrow margin of victory” for the petitioners).